Fountain Court

Quarterly Commercial Crime Newsletter:

RECENT UPDATES

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This section of our quarterly commercial crime newsletter includes updates on recent cases and developments including in relation to:

- **Russia sanctions – two significant judgments**: a summary of the Court of Appeal's landmark judgment addressing various features of the Russia sanctions regime in *PJSC National Bank Trust, Bank Otkritie v Mints* [2023] EWCA Civ 1132; further post-*Mints* consideration of the ownership and control test in *Litasco SA v Der Mond Oil and Gas Africa SA* [2023] EWHC 2866 (Comm), and OFSI's "Ownership and Control: Public Officials and Control Guidance" in light of the *Mints* judgment.
- **Major reform of corporate criminal liability law (partially) enters into force:** consideration of the Economic Crime and Corporate Transparency Act, which received Royal Assent on 26 October 2023.
- **Private prosecutions and abuse of process**: the decision of the Court of Appeal in *Morjaria v Westminster Magistrates Court* [2023] EWCA Civ 1338, concerning a decision to set aside a summons in respect of a private prosecution on abuse of process grounds.
- **Global investigations and legal professional privilege**: the judgment of Murray J in *Al Sadeq v Dechert* [2023] 1 W.L.R. 3749, addressing a number of issues arising in the context of a global investigation into alleged frauds in government entities of the Emirate of Ras-Al-Khaimah, UAE.
- **Restitution and regulatory contraventions**: the FCA's power pursuant to s.328 FSMA 2000 to make restitution orders against firms or individuals "knowingly concerned" in regulatory contraventions.
- **Non-conviction forfeiture of assets and human rights:** the incompatibility with Article 1 Protocol of the European Convention on Human Rights of a regime for non-conviction forfeiture of assets.

I. Russia sanctions – two significant judgments

Two recent judgments address the interaction between ongoing civil litigation involving designated persons and the Russia sanctions regime in the Russia (Sanctions) (EU Exit) Regulations 2019 ("**the Russia Regulations**"):

- *PJSC National Bank Trust, Bank Otkritie v Mints* [2023] EWCA Civ 1132; and
- *Litasco SA v Der Mond Oil and Gas Africa SA* [2023] EWHC 2866 (Comm).

PJSC National Bank Trust, Bank Otkritie v Mints [2023] EWCA Civ 1132

In *PJSC National Bank Trust v Mints* [2023] EWCA Civ 1132, two Russian state-owned banks brought claims (commenced in 2019) against a number of individuals, under Russian law causes of action in tort, seeking damages quantified at some US$850 million. Shortly after the invasion of Ukraine, the Second Claimant, Bank Otkritie, was designated and made subject to the sanctions. The First Claimant, NBT, which is 99% owned by the Central Bank of Russia, has not been designated.

The Second and Third Defendants (supported by the First and Fourth Defendants) brought an application seeking a stay of the proceedings and discharge of undertakings granted in lieu of a Worldwide Freezing Order, contending that, as a result of the impact of the sanctions on the proceedings, both the continuation of the proceedings to trial and the WFO undertakings were inappropriate and unfair. In particular, those Defendants contended:

1. Entry of judgment in favour of a designated person is prohibited by the sanctions, because entering judgment would involve "making funds or economic resources" available to the designated person, contrary to at least Regulations 11, 14 and 15 of the Russia Regulations. As judgment could not lawfully be entered, progressing the proceedings to trial was both pointless and prejudicial ("**the Entry of a Judgment Issue**").

2. The licensing grounds in Schedule 3, para 5 of the Russia Regulations did not permit the following litigation steps to be lawfully licensed: (i) payment in satisfaction of a costs order to a designated person, (ii) receipt of payment pursuant to a costs order by a designated person, (iii) payment of security for costs, and (iv) payment of damages pursuant to the cross-undertaking granted as the price for the WFO undertakings. This meant that the continuation of the proceedings was prejudicial and unfair; alternatively, if the proceedings were to continue, the WFO undertakings should be discharged, in light of the inability for the Claimants to lawfully pay damages pursuant to their cross-undertaking ("**the Licensing Issue**").

3. It did not matter that only the Second Claimant, Bank Otkritie, is a designated person, because the First Claimant, NBT, is owned or controlled by one or more designated persons within the meaning of Regulation 7 of the Russia Regulations (namely, President Vladimir Putin and/or Governor Elvira Nabiullina, the Governor of the Central Bank of Russia), such that it too is subject to the sanctions ("**the Control Issue**").

These issues arose in *NBT v Mints* in a somewhat stark factual context, in view of the connections between NBT and the Russian state. The Central Bank of Russia (as well as being its ultimate owner) was

also NBT's major creditor, and as a consequence any recoveries in respect of the US$850 million in damages sought by NBT were to be paid to it. The Central Bank of Russia was, in turn, required by Russian law to transfer 75% of its profits directly to the federal budget of the Russian Federation. The First to Fourth Defendants argued that it would be wholly inconsistent with the objectives of the sanctions regime for NBT to be able to obtain a substantial judgment from the English Court which it could then in theory seek to enforce in jurisdictions which were not subject to sanctions, whilst the sanctions were ongoing.

The application was dismissed at first instance, Cockerill J finding against the First to Fourth Defendants on every point: see [2023] EWHC 118 (Comm). Notably, in relation to the Control Issue, the parties had served extensive expert evidence of Russian law and political economy addressing whether President Putin and/or Governor Nabiullina controlled NBT as a matter of fact. However, by the time of the hearing before Cockerill J, the Claimants had conceded that, subject to one legal argument, NBT could be said to be controlled by one or both of President Putin and/or Governor Nabiullina within the meaning of Regulation 7. The legal argument was that Regulation 7 was subject to an implied carve-out excluding from its scope control exercised by virtue of political or corporate office. Although in light of her other findings that issue did not strictly arise, Cockerill J held that she would have found there to be such an implied carve-out in Regulation 7, albeit on a narrower basis than that proposed by the Claimants, such that control exercised by political office only fell outside the scope of Regulation 7.

Cockerill J granted the First to Fourth Defendants permission to appeal to the Court of Appeal on five grounds, addressing all of her conclusions.

The Court of Appeal upheld Cockerill J's judgment, finding in favour of the Claimants on each issue (save for the Control Issue).

As to the Entry of a Judgment Issue, the Court of Appeal held that (i) a cause of action was not a fund, but was an "economic resource": [199]; (ii) however, entering a judgment did not involve "making a fund available", as those words were not apt to describe the entry of a judgment: [201]-[202]; (iii) the acts of the Claimants, in seeking judgment on their causes of action, did not amount to using that economic resource in exchange for funds, contrary to Regulation 11(5)(b): [206]; and (iv) although this was not necessary for the Court's conclusion, the principle of legality would also have precluded a prohibition on entry of a judgment, because there were no sufficiently clear and unambiguous words to authorise the curtailment of the common law right of access to the Court: [203]; [209]-[210]. In any event, even if entry of a judgment were prohibited, the Court would not have considered it appropriate to grant a stay: [212].

As to the Licensing Issue, the Court of Appeal rejected the First to Fourth Defendants' arguments, in summary as a result of an analysis of the statutory language of the licensing grounds, and also because a narrow construction would frustrate the designated person's right of access to the Courts: see [214]-[224].

As to the Control Issue, although the issue did not arise in light of its other conclusions, as the point had been fully argued, and was of some general significance, the Court of Appeal considered it appropriate to address it briefly. At [225], the Court held that NBT

was, contrary to Cockerill J's conclusions, owned or controlled within the meaning of Regulation 7 by President Putin and/or Governor Nabiullina. Both Regulation 7(2) and Regulation 7(4) were concerned with ownership and non-ownership forms of control, and the test in Regulation 7(4) could be satisfied if a designated person "*calls the shots*" in relation to a company, irrespective of the means by which they do so: see [229].

The Claimants relied heavily on an absurdity argument, contending that in the absence of an implied carve out in Regulation 7 in respect of corporate and political office, Regulation 7, when coupled with the designation of President Putin, would have the effect of making practically everyone in Russia subject to the sanctions, because of President Putin's ability in principle, as a designated person wielding substantial power, to exercise control in that sense if he so wished. Sir Julian Flaux C (with whom Newey and Popplewell LJJ agreed) said this in response to that argument (at [233]):

> "*…the absurd consequences arise not from giving the Regulation its clear and wide meaning but from the subsequent designation by the Government of Mr Putin, without having thought through the consequences that…Mr Putin is at the apex of a command economy. In those circumstances, consistently with the concession [i.e. the Claimants' concession that control was made out on the facts]…in a very real sense (and certainly in the sense of Regulation 7(4)), Mr Putin could be deemed to control everything in Russia…*"

The statutory language that was at issue in *PJSC NBT v Mints* (including in relation to the control test) is mirrored in many other sanctions regimes enacted pursuant to the Sanctions and Anti-Money Laundering Act 2018. As such, the Court of Appeal's conclusions are likely to be of wider significance.

Litasco SA v Der Mond Oil and Gas Africa SA [2023] EWHC 2866 (Comm)

Litasco is the first judgment (handed down on 15 November 2023) to consider the control test under Regulation 7 of the Russia Regulations in light of the Court of Appeal's judgment in *PJSC NBT v Mints*. In *Litasco*, the Claimant, a Switzerland incorporated oil marketing and trading company, sought summary judgment in respect of a contractual claim for debt or damages arising from the sale of crude oil.

The Defendants sought to defend the claim on various grounds, including allegations of misrepresentation, and on the basis of force majeure and trade sanctions clauses in the contract, as well as a general sanctions defence said to arise as a matter of sanctions law.

In relation to the non-sanctions defences, Mr Justice Foxton found that all of these lacked a real prospect of success.

As for the sanctions-related defences, Mr Justice Foxton held that, in light of the conclusion in *PJSC NBT v Mints* that the sanctions did not bar entry of a judgment in favour of a designated person, the sanctions could not provide a defence to a claim against a designated person: [44(iv)].

However, one of the sanctions defences required consideration of whether Trade Sanctions had been imposed against Litasco, and the Defendants contended that Regulation 12 of the Russia Regulations applied to Litasco, as a result of the operation of the control test in Regulation 7.

At [61], Foxton J noted that the language in Regulation 7(4), about the affairs of the entity being conducted "*in accordance with [the Designated Person's] wishes*" appeared to have first featured in Schedule 2 of the Broadcasting Act 1990, concerning restrictions on holding broadcast licences. An amendment by the Communications Act 2003 introduced statutory language very similar to the control test in Regulation 7(4) of the Russia Regulations. The same statutory language had since become a *"staple of the UK sanctions regulations"*.

The Defendants advanced two bases for contending that Litasco was owned or controlled by a designated person within the meaning of Regulation 7. The first was that Litasco was controlled by its founder and former president and chief executive, Mr Alekperov, a designated person. However, Foxton J found that there was no arguable basis for this on the facts.

As an alternative argument, the Defendants contended that President Putin controlled Litasco within the meaning of Regulation 7, having regard to the Court of Appeal's statements in *PJSC NBT v Mints*.

In considering this issue, Foxton J began by considering the different facts of *NBT v Mints*, in which NBT was 99% owned by the Central Bank of Russia, which the Mints Defendants contended was an organ of the Russian state, and over which President Putin exercises de facto control. Foxton J considered it "*perhaps not surprising*" against that background that factual control of NBT by President Putin was conceded: [67].

Although Foxton J considered it strongly arguable that President Putin "*has the means of placing all of Litasco and/or its assets under his de facto control, should he decide to do so*", at [70] Foxton J proposed an alternative interpretation of Regulation 7, whereby control under Regulation 7 is concerned with existing influence of a designated person over the affairs of a company, rather than a state of affairs that the designated person could bring about, if they so wished:

> "*Were matters otherwise, it would follow that President Putin was arguably in control, for Regulation 7 purposes, of companies of whose existence he was wholly ignorant, and whose affairs were conducted on a routine basis without any thought of him.*"

As a result, there was no arguable case that President Putin controlled Litasco within the meaning of Regulation 7 such that it was subject to the sanctions in the Russia Regulations.

Ownership and Control: Public Officials and Control Guidance

The Court of Appeal's consideration of the control test in *PJSC NBT v Mints* generated an immediate response from the FCDO, which issued a press release on 16 October 2023 (ten days after the judgment was handed down) stating that it was "*carefully considering*" the impact of the judgment.

On 17 November 2023, OFSI issued some new guidance titled "Ownership and control: Public Officials and Control guidance". Guidance from OFSI has no binding effect as to the interpretation of the Russia Regulations. The key points arising from the guidance (which can be seen as a response to the Court of Appeal's judgment in *PJSC NBT v Mints*) are as follows:

- The FCDO does not "*generally*" consider that public officials exercise control over a public body in which they

exercise a leadership function, such that the test in Regulation 7(4) is satisfied.

- If the FCDO thought that a public official *was* exercising control in that way, then it would look to designate the public body.

- However, if there was sufficient evidence to demonstrate that the designated person exercises control over the public body, then the test under Regulation 7(4) may be satisfied; this would depend on the circumstances.

- There is no presumption on the part of the UK Government that a private entity is subject to the control of a designated public official simply because that entity is incorporated in a jurisdiction in which the official has a leading role in policy-making.

- In relation to Russia specifically, "*the UK government does not consider that President Putin exercises direct or de facto control over all entities in the Russian economy merely by virtue of his occupation of the Russian Presidency…*"

It remains to be seen how the control test will be applied in subsequent cases, however as Foxton J noted in *Litasco* (at [80]), there are unlikely to be a shortage of disputes in which these issues arise.

Simon Paul appeared for the First to Fourth Defendants in the Court of Appeal in PJSC NBT v Mints (and for the Second and Third Defendants at first instance) (with Laurence Rabinowitz KC and Niranjan Venkatesan of One Essex).

II. Major reform of corporate criminal liability law enters (partially) into force

On 26 October 2023, the Economic Crime and Corporate Transparency Act ("**ECCTA**"), the most significant legislative intervention regarding corporate criminal liability since the Bribery Act 2010, received Royal Assent.

The two most significant and general reforms in ECCTA as regards corporate criminal liability are: (1) the creation of a route to corporate criminal lability for economic crimes via offences committed by "senior managers" (s.196), and (2) a new offence of failure to prevent fraud (s.199).

Readers of this newsletter are likely to be very familiar with these developments. We therefore confine ourselves to summarising briefly the key features of these two provisions as enacted, and their dates of commencement.

S.196 – the senior manager route to corporate criminal liability

Many of the provisions in ECCTA will not enter into force until specific regulations are made by the Secretary of State or the Lord Chancellor. However, the new route to corporate criminal liability set out in s.196 enters into force on 26 December 2023, being two months after the date ECCTA was passed (see s.219(3)).

Section 196 provides a statutory regime for the criminal liability of senior managers in bodies corporate or partnerships to be attributed to those organisations, with the result that the organisations are also guilty of certain offences committed by the senior managers.

Pursuant to s.196(1), this route to corporate criminal liability applies only in respect of (i) "relevant offences" (those common law and statutory economic crimes listed in Schedule 12 and related offences), and (ii) acts committed by the senior manager within the scope of their actual or apparent authority. (ECCTA does not contain a definition of "apparent

authority" for these purposes, however as a matter of civil law, the principles are well-established; for a convenient summary see *East Asia Company Ltd v PT Satria Tirtatama Energindo* [2020] 2 All E.R. 294 (Privy Council) at [41]-[43] per Lord Kitchin).

Organisations are not guilty of offences under s.196(1) where all the relevant conduct occurred outside the United Kingdom, unless it would be guilty of the offence in the location where the acts took place: s.196(3).

"Senior Managers" are defined for these purposes by s.196(4) as "*an individual who plays a significant role in (a) the making of decisions about how the whole or a substantial part of the activities of the body corporate or (as the case may be) the partnership are to be managed or organised, or (b) the actual managing or organising of the whole or a substantial part of those activities.*"

S.199 – Failure to prevent fraud

The new failure to prevent fraud offence introduced by s.199 of ECCTA will not enter into force until regulations are made. There is specific provision in the commencement section of ECCTA providing that regulations bringing the failure to prevent fraud offence cannot be made until the Secretary of State has published guidance under s.204(3) about procedures that relevant bodies can put in place to prevent them from committing the offence, so as to give rise to a defence under s.199(4).

The main ingredients of liability for the failure to prevent offence are as follows (s.199(1)):

1. A relevant body which is a large organisation (pursuant to s.201(1), a body with two or more of turnover of more than £36 million, a balance sheet total of more than £18 million and more than 250 employees);

2. A person associated with the body commits a fraud offence (i.e. offences listed in Schedule 13, or the aiding, abetting, counselling or procuring of such offences);

3. The person associated intends to benefit (whether directly or indirectly) the relevant body, or any person to whom, or to whose subsidiary, the associate provides services on behalf of the relevant body.

The offence can also be committed by employees of subsidiaries of relevant bodies which are large organisations (and thus even if the subsidiary is not itself a large organisation) (s.199(3)).

No offence is committed if the relevant body is, or was intended to be, a victim of the fraud offence (s.199(3).

By s.199(4), it is a defence if the relevant body can prove that at the time of the fraud offence it had in place "*such prevention procedures as it was reasonably in all the circumstances to expect the body to have in place*", or "*it was not reasonably in all the circumstances to expect the body to have any prevention measures in place.*"

"Prevention procedures" are defined by s.199(5) as "*procedures designed to prevent persons associated with the body from committing fraud offences.*"

III. Private prosecutions and abuse of process

The recent decision of the Administrative Court in *Morjaria v Westminster Magistrates*

Court [2023] EWCA Civ 1338 provides a salutary warning to practitioners involved in private prosecutions against a backdrop of parallel civil proceedings.

In *Morjaria*, the Claimant ("PM") contended that he had been defrauded by a former friend and joint venture partner ("CM") in respect of a property development opportunity. The basic allegation was that CM had deliberately misled PM into believing that some cladding replacement work to a property following the Grenfell Tower disaster had cost £2.7 million, whereas in reality the works cost less and a substantial sum had been appropriated by CM.

PM threatened civil proceedings against CM engaging in pre-action correspondence, some of which raised the threat of criminal proceedings via a private prosecution. Meanwhile, PM instructed a separate firm of solicitors in relation to a private prosecution, who invited CM to attend an interview under caution. A mediation took place in August 2022, and it had been intended that the summons would be issued shortly before this, although in the end it was not issued until shortly after the mediation concluded.

CM applied to set aside the summons, and at the same time made requests of PM's solicitors for disclosure of communications relevant to PM's motives for applying for the summons, and the relationship between the civil and criminal proceedings. Communications between PM and his civil solicitors were then passed to PM's criminal solicitors, acting in respect of the private prosecution, who reviewed and disclosed them.

The judgment contains a detailed summary of the communications between PM and his civil and criminal solicitors. The gist of those communications was that PM considered the civil claim he was pursuing and the private prosecution to be closely connected. For example, PM repeatedly stressed to both his civil and criminal solicitors the need to include the threat of jail time in communications with CM, as an incentive for him to settle. For example, a document sent by PM to his criminal solicitors in October 2021 included the statement "…*we need serious fire power and threat of maximum JAIL term to bring him to his knees and make him want to settle and close the chapter*" ([15]).

On an application to set aside the summons pursuant to Rule 7.2(14) of the Criminal Procedure Rules, made with the benefit of the disclosed material, the Judge held that (1) there was *prima facie* evidence of the offences charged, but (2) the motive of PM in initiating the criminal proceedings was to threaten the defendants in order to extract a settlement from them; indeed, this was held to be PM's "*primary motivation*" ([21]-[22]).The summons was therefore set aside on the basis that the private prosecution was an abuse of process.

PM applied for permission to judicially review that decision to set aside the summons. At a rolled-up permission hearing, Lord Justice William Davis and Mrs Justice Mary Stacey upheld the judge's approach, finding that (1) there was no error in the Judge's approach to the legal test for abuse ([42]), (2) the Judge's conclusion that the proceedings were abusive was open to him ([43]) and (3) the non-disclosure of PM's communications with his lawyers at the initial application for the summons was a serious error ([47]).

Notably, one of the arguments made in support of the application for permission to judicially review the setting aside of the summons was that there was nothing wrong with PM's motives, because restitution for the victim is a proper

objective of the criminal justice system. As to this, the Court held at [48] "*[w]hilst it is correct that restitution for the victim may be a proper objective of the criminal justice system, this assumes that the criminal process is to be used directly for that reason. In this instance, the criminal proceedings were to be used as a means to an end. The purpose of the criminal process is not to serve the private interests of any individual. The fact that there was and is prima facie evidence of fraud on the part of CM and others cannot legitimise criminal proceedings when their purpose was to threaten.*"

IV. Global investigations and legal professional privilege

In *Al Sadeq v Dechert* [2023] 1 W.L.R. 3749, Mr Justice Murray delivered a judgment addressing a number of privilege issues arising in the context of a global investigation into alleged frauds in government entities of the Emirate of Ras-Al-Khaimah, UAE, led by an international law firm's White Collar practice.

The proceedings comprise a civil claim under UAE law causes of action brought by a former senior legal officer in RAKIA, Ras-Al-Khaimah's sovereign wealth fund, against the law firm and current or former partners involved in the investigation. Mr Al Sadeq alleges that serious wrongs were committed against him in the course of the investigation, such as detention in conditions amounting to torture and inhuman and degrading treatment (including a period of 560 days in solitary confinement), forced confessions and denial of access to legal representation.

Mr Al Sadeq brought an application challenging the defendants' claims to privilege in respect of the civil proceedings on three main grounds:

1. Iniquity: Mr Al Sadeq contended that there was a strong *prima facie* case of three categories of iniquity, (i) unlawful detention, (ii) detention in conditions amounting to torture/inhuman and degrading treatment, and (iii) denial of access to legal representation, and that there were likely to be documents forming "part of" those iniquities such that no privilege attached to them. By the time of the hearing, it was common ground that at least part of Mr Al Sadeq's detention had been in conditions contrary to Article 3 of the European Convention on Human Rights.

2. Litigation privilege: Mr Al Sadeq challenged the defendants' claims to litigation privilege on three main grounds: (i) that the evidence provided in support of the privilege claims was inadequate, (ii) that it was not permissible for the defendants to claim litigation privilege on behalf of their former clients in respect of criminal proceedings in RAK, as litigation privilege only operates in favour of an actual or potential party, and (iii) criminal litigation was not reasonably in contemplation before a complaint had been made to the RAK public prosecutor.

3. Legal advice privilege: Mr Al Sadeq contended that a distinction needed to be drawn between the work conducted by the defendants *qua* investigators, and their work *qua* lawyers, such that communications for the dominant purpose of the former were not subject to legal advice privilege.

Mr Justice Murray's judgment (handed down some sixteen months after the two-day hearing of the application) dismissed the application in its entirety. In relation to iniquity, the Judge held that the category of documents sought by Mr Al Sadeq

(being documents "*generated by or reporting on*" the three iniquities) was too broad, and as a consequence the Judge considered that he did not need to decide whether the iniquities were established to the strong *prima facie* standard on the facts (although he indicated he would have agreed with the Defendants on that point): [111]-[115]. As to litigation privilege, the Judge held that the evidence provided by the defendants was sufficient in the circumstances, and (as discussed in our accompanying commentary article) that litigation privilege could properly be claimed by a non-party who has a sufficient interest in the relevant litigation: [212]. Finally, as regards legal advice privilege, the Judge held that, placing reliance in particular on the terms of the engagement letters, all of the Defendants' work occurred in a relevant legal context, and it would be artificial to distinguish between the law firm's work *qua* investigators and *qua* lawyers: [136]-[138].

The Court of Appeal has since granted Mr Al Sadeq permission to appeal on each of the main aspects of the Judge's findings, with an expedited appeal due to take place in December 2023.

Whilst many of the issues in the case are fact-sensitive, the Judge's conclusion that litigation privilege can arise in favour of non-parties such as the putative victims of crime is a significant and controversial one (the Judge deciding not to follow another first instance judgment on that point). The Court of Appeal's judgment is likely to provide important guidance as to the relationship between legal professional privilege and global investigative work, albeit in a factual context that is unusual and extreme.

Tamara Oppenheimer KC and Simon Paul acted for Mr Al Sadeq at first instance and in the Court of Appeal.

V. Restitution and regulatory contraventions

The recent case of *FCA v Forster* [2023] EWHC 1973 (Ch) provides an example of the FCA's regulatory power to make restitution orders under s.328 of the Financial Services and Markets Act 2000 ("**FSMA**") against individuals "knowingly concerned" in regulatory contraventions, and who have been enriched thereby.

In *Forster*, the FCA brought regulatory proceedings arising out of a scheme whereby members of the public were sold investments in care homes, under the brand "Qualia", seeking a restitution order against Mr Forster, a person alleged to have been the controlling mind of the investment companies. The Judge (Simon Gleeson, sitting as a Deputy High Court Judge) found as follows, accepting the FCA's case in its entirety:

1. The scheme comprised a "collective investment scheme" within the meaning of s.235 of FSMA: [148].

2. The collective investment scheme was promoted on the basis of false and misleading statements or impressions, contrary to s.89 and 90 FSMA (which provide offences for making misleading statements and impressions with the intention or recklessness as to whether persons would be induced thereby to enter into the investments). In particular, investors were given the false or misleading impressions that (see [170]):

    a. The care homes would produce sufficient profit to allow the investment companies to meet their obligations under various agreements, the investment companies (and Mr Forster) honestly believed that they

would be able to do so, and that the care homes would be sustainable in their own right, without the need to rely on the investments of later investors to meet the obligations due to earlier investors (these points were referred to collectively as the "**Sustainability Impressions**").

b. In relation to the sales of certain care homes, that the investment companies owned the care homes they were selling, when in fact they did not (referred to as "**the Unowned Care Home Impressions**").

3. Mr Forster acted as the directing mind and will of the investment companies, such that his knowledge fell to be attributed to the investment companies for this purpose ([161]).

4. In relation to the Sustainability Impressions, these were false and misleading because it must have been apparent to Mr Forster that Qualia's business was unsustainable, and that it would run out of cash "*long before there was any prospect of it generating significant revenue*": [195].

5. In relation to the Unowned Care Home Impressions, based principally on the marketing materials provided to investors, as well as hearsay evidence from the investors themselves, these were found to have been made (there being no real dispute that if the impression was made/given, then it was false): [201]-[221].

6. Accordingly, the investment companies had breached ss.89 and 90 of FSMA ([198]; [224]).

7. Mr Forster was "knowingly concerned" in the investment companies' breaches; in particular, he was the "*driving force behind their activities and business*" and he knew that they were "*raising money on the basis of promises which were first very unlikely to be, and later incapable of being, fulfilled*": [269].

8. Mr Forster was personally enriched to the extent of at least £1,866,054 (subject to any tax paid on those sums): [272]-[273].

In assessing whether Mr Forster was knowingly concerned in the companies' breaches, a particular question arose. Mr Forster contended that the mental requirement could not be satisfied, because he had received legal advice that the investment schemes did not amount to collective investment schemes within the meaning of s.235 FSMA. Mr Forster waived privilege over two opinions he had received from Counsel for that purpose.

In assessing this defence, whilst the Judge found that in principle reliance on legal advice could negate a finding of recklessness or intention in respect of the contraventions, nonetheless an independent legal opinion was "*not a get-out-of-jail-free card*": [248]. In the circumstances of this case, the legal advice Mr Forster received and waived privilege over (which the judgment quoted from) was based on false factual assumptions about the nature of the schemes, and the Judge found that Mr Forster must have known, or turned a blind eye to, the fact that the opinions were delivered on that false basis: see [250]-[259]; [263]. The legal opinions that the schemes were not CISs therefore did not alter the conclusion that Mr Forster was "knowingly concerned" in the regulatory contraventions. Similarly, although Mr Forster sought to rely on a letter from the FCA confirming that, in the FCA's view,

certain of the schemes were not CISs, that too was based on an incorrect factual assumption: [261].

VI. Non-conviction forfeiture of assets and human rights

On 26 September 2023, in *Yordanov & Ors v Bulgaria* (Application nos. 265/17 and 26473/18) the European Court of Human Rights ("**ECtHR**") found that non-conviction forfeiture of assets, pursuant to a Bulgarian statutory regime with some similarities to the Unexplained Wealth Orders and civil recovery regimes in POCA 2002 (as amended by the Criminal Finances Act 2017), amounted to a violation of Article 1 Protocol 1 of the European Convention on Human Rights. The Court's reasoning is likely to be of interest to practitioners responding to UWOs or civil recovery actions in this jurisdiction.

The applications

The case concerned the Bulgarian Forfeiture of Proceeds of Crime Act 2012 ("**the 2012 Act**"). The 2012 Act provided for a regime of civil forfeiture of "unlawful" assets, which were defined as "*assets for which no lawful origin [was] established*" ([38]). The critical feature of the scheme, therefore, was that it enabled forfeiture of assets in the absence of a criminal conviction in respect of those assets, with the burden falling on the defendant to establish that the assets were not of unlawful origin.

The ECtHR considered the operation of this scheme and its compatibility with A1P1 in the context of two joined applications to the Court.

The first applicant, Ms Bozadzhieva, was convicted in summary proceedings for two offences: (1) of evading income tax in the total sum of EUR 26,760 in respect of monies totalling EUR 163,000 transferred to her via Western Union from abroad, and (2) of fraudulently receiving EUR 1,176 in child benefit payments. The Bulgarian Commission for Forfeiture of Unlawfully Acquired Assets ("**the Commission**") brought forfeiture proceedings under the 2012 Act in respect of land, a vehicle, the value of shares and other assets. The forfeiture proceedings failed at first instance, but an appeal was allowed, with the Court of Appeal of Varna rejecting the applicant's case that the sums of money received via Western Union were gifts and loans.

The second applicant, Mr Yordanov, owned plots of land worth around 254,000 Euros in Bulgaria. He had been charged and convicted of evading income tax and using forged documents. The Commission brought forfeiture proceedings under the 2012 Act, seeking forfeiture of vehicles, sums of money in bank accounts, the value of shares and property. Although there was evidence that Mr Yordanov was being investigated in Belgium for human trafficking, money laundering and other offences, he had not been formally charged or convicted in relation to any of those activities. The national Court did not accept Mr Yordanov's evidence as to the source of his wealth, and concluded that the assets subject to the forfeiture application had been unlawfully acquired. Mr Yordanov's complaint that no link had been established between the assets subject to forfeiture and the offence for which he had been convicted was rejected: [15].

The Court's decision

The Court found that there had been violations of Article 1 Protocol 1 in respect of each of the applicants.

First, the Court considered the statutory scheme of the 2012 Act and found (following its own prior case law on similar regimes) that it pursued the legitimate aim

of preventing the illicit acquisition of property through criminal or administrative offences: [110]-[111].

Second, the Court made some general observations about the proportionality of conduct undertaken pursuant to the 2012 Act. The Court noted that the 2012 Act permitted forfeiture action to be taken in relation not only to serious offences, but also to administrative offences: [115], and that it placed the burden of proving the lawful provenance of assets on the defendants: [118]. Whilst the imposition of a burden of this nature, and the difficulties defendants faced in rebutting it, were of concern, those aspects of the forfeiture regime did not in themselves render confiscation undertaken pursuant to it a violation of Article 1 Protocol 1.

However, the Court found it to be of greater concern that the approach taken by the 2012 Act scheme was apparently to assume (without the need to establish) that the defendants had been engaged in unspecified criminal or unlawful activities over a period of years, and, moreover, that those activities were presumed to be the source of the assets to be forfeited. As to this, the Court held (at [121]-[122]):

> "*121.....While the Court is aware that organised crime can sometimes resort to more sophisticated methods of acquiring property, rendering the tracing of its origins difficult, it cannot but notice at the same time that an important safeguard contained in the 2005 Act was removed with the 2012 Act, namely the requirement to establish some link between the assets to be forfeited and the predicate offence....*
>
> *122. In such a situation the Court considers it appropriate to follow, in so far as possible and in the light of the features of the present case, an approach similar to that established in* Tadorov and Others*...In that case it reached the conclusion that, for any interference with individual rights under the 2005 Act to be in conformity with the requirements of Article 1 of Protocol No. 1, the national courts ordering the forfeiture had to provide some particulars as to the criminal conduct in which the assets to be forfeited were alleged to have originated, and show in a reasoned manner that those assets could have been the proceeds of that conduct; such a requirement was seen as a counterbalance against the State's advantage in the forfeiture proceedings, stemming from the restrictions on the ability of defendants to effectively challenge the measures against them under the 2005 Act, and as a basic guarantee of the applicants' rights..."*

Accordingly, in order for forfeiture to be compliant with A1P1, it was essential for domestic courts to provide some particulars as to the offences in which the assets subject to forfeiture were alleged to have originated, and to show in a reasoned manner that there could be a link between such offences and the assets in question, although where the national court had undertaken such an assessment, the ECtHR would defer to it unless it was arbitrary or manifestly unreasonable: [124]-[125].

Both applicants were thus found to have established violations of their A1P1 rights, because in neither case had the Bulgarian Court sought to find a link between the offences of which they had been convicted (and which were the trigger for the forfeiture proceedings) and the assets that were confiscated. As a result, the interferences with the applicants' A1P1 rights were not proportionate to the legitimate aim of preventing the illicit acquisition of criminal property.

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